84-255

Office Supreme Court, US
FILED
AUG 15 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GARLAM ENTERPRISES CORPORATION,
Petitioner,

v.

AUTORIDAD DE CARRETERAS DE PUERTO RICO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

LUIS GUINOT, JR.
PAUL A. LENZINI*
WILLIAM A. HUTCHINS
1825 Eye Street, N.W.
Suite 300
Washington, D.C. 20006

Attorneys for Petitioner

Of Counsel:

CHAPMAN, DUFF AND PAUL
1825 Eye Street, N.W.
Suite 300
Washington, D.C. 20006
August 15, 1984

* *Counsel of Record*

QUESTIONS PRESENTED [1]

1. Where petitioner was entitled to prejudgment interest under Article 1061 of the Civil Code of Puerto Rico (31 L.P.R.A. § 3025), did the failure of both the Supreme Court and the Superior Court of Puerto Rico to give any explanation at any stage of the proceedings below for their refusal to grant petitioner's claim for such interest deny petitioner's rights under the due process and equal protection clauses of the Constitution of the United States?

2. Where a highway construction unit-price contract allowed the Puerto Rico Highway Authority to issue change orders and additional work orders while allowing the contractor the right to renegotiate applicable unit prices if work done under change orders and additional work orders increase total contract cost by more than 25 percent, a clause drawn nearly verbatim from standard clauses in federal highway construction, did the Supreme Court of Puerto Rico err in holding that the contractor waives his right to seek increases in contract-established unit prices for additional work ordered by the government, resulting in cost increases in excess of 25 percent, where the contractor agrees to perform such additional work before a new unit price is negotiated?

---

[1] The parties below were Garlam Enterprises Corporation, plaintiff, and Autoridad de Carreteras de Puerto Rico, defendant.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
I. The Failure to Explain the Refusal to Award Prejudgment Interest Violates the Due Process and Equal Protection Clauses	6
II. The Supreme Court Misinterpreted a Standard Federal Contract Clause as Requiring the Contractor, in Order to Avoid Waiving His Right to Seek an Upward Adjustment of the Unit Prices for Additional Work, to Refuse to Perform All Change Orders Until an Agreement on a Satisfactory New Price is Reached	10
CONCLUSION	14

TABLE OF AUTHORITIES

	Page
CASES	
Arias v. *Examining Bd. of Refrigeration and Air Conditioning Technicians*, 353 F. Supp. 857 (D.P.R. 1972).	8
City of Miami v. *Woolin*, 387 F.2d 893 (5th Cir. 1968) ..	10
Civico v. *Rodriguez*, 4 P.R.R. 296 (1903)	10
Defenders of Wildlife v. *Endangered Species Scientific Authority*, 659 F.2d 168 (D.C. Cir.), *cert. denied*, 454 U.S. 963 (1981)	8-9
Del Rio v. *Sastre*, 9 D.P.R. 174 (1905)	10
Denofre v. *Transportation Insurance Rating Bureau*, 532 F.2d 43 (7th Cir. 1976)	9
Fuentes v. *Hull Dobbs Co.*, 88 P.R.R. 544 (1963)	10
Goldberg v. *Kelly*, 397 U.S. 254 (1970)	8
Gulf States Utilities Co. v. *Federal Power Commission*, 411 U.S. 747 (1973)	9
Kelly v. *Everglades Drainage District*, 319 U.S. 415 (1942)	9
Martinez Fernandez & Cia v. *Garcia*, 68 P.R.R. 363 (1948)	7
Midrose Foods, Inc. v. *Roman*, 454 F.2d 1159 (1st Cir. 1972)	7
Morrison-Knudsen Co. v. *United States*, 397 F.2d 826 (Ct. Cl. 1968)	4,11,13
Rucker v. *Higher Educational Aids Board*, 669 F.2d 1179 (7th Cir. 1982)	9
Sadler v. *United States*, 287 F.2d 411 (Ct. Cl. 1961)	13
Sobrinos De Bortille v. *Quinones*, 5 P.R.R. 455 (1904) ...	7
Village of Winnetka, Illinois v. *Federal Energy Regulatory Commission*, 678 F.2d 354 (D.C. Cir. 1982)	9
W. B. Flesh & Bros. v. *Gonzalez*, 28 P.R.R. 639 (1920) ..	7
STATUTES	
U.S. Const. amend. XIV, § 1	6,8,10
28 U.S.C. § 1258(3)	2
31 L.P.R.A. § 3025	5,6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GARLAM ENTERPRISES CORPORATION,
Petitioner,

v.

AUTORIDAD DE CARRETERAS DE PUERTO RICO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

Petitioner Garlam Enterprises Corporation (hereinafter "Garlam") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Puerto Rico entered on February 29, 1984.

OPINIONS BELOW

A translation of the opinion of the Supreme Court of Puerto Rico appears in the Appendix hereto, at p. 2a, *infra*. A translation of the opinion of the Superior Court appears in the Appendix hereto, at p. 6a, *infra*. Both translations were made and certified by the official translator for the United States District Court for the District of Puerto Rico.

JURISDICTION

The judgment of the Supreme Court of Puerto Rico was entered on February 29, 1984. A timely petition for reconsideration was entertained by the court and denied on May 17,

1984. This petition for writ of certiorari is filed within ninety days of that date. The judgment below denies petitioner Garlam's rights under the due process and equal protection clauses of the Constitution of the United States; this Court's jurisdiction is accordingly invoked under 28 U.S.C. § 1258(3).

STATUTORY PROVISION INVOLVED

Section 1061 of the Civil Code of Puerto Rico (31 L.P.R.A. § 3025) is set out in the Appendix hereto, at p. 18a, *infra.*

STATEMENT OF THE CASE

This civil action arises out of a contract between Garlam and the Autoridad de Carreteras de Puerto Rico (hereinafter "the Authority") for the construction of Las Americas Highway in Puerto Rico. Plaintiff Garlam filed suit seeking, *inter alia,* renegotiation of the unit prices applicable to extra work ordered by the Authority, payment due for work performed, consequential damages and pre-judgment interest. After trial, the Superior Court of Puerto Rico denied Garlam's claims for renegotiation, consequential damages and interest, but granted Garlam judgment in the amount of $2,466,316.73 for work performed but unpaid. The Supreme Court of Puerto Rico affirmed the lower court's judgment, and denied Garlam's motion for reconsideration.

Until 1975, the road linking the two major cities of Puerto Rico, San Juan and Ponce, was a treacherous and inconvenient route. With the industrial and agricultural development of the island as a primary motive, the Authority in the late 1960s decided to build a modern highway along the route to reduce travel time and improve safety.

In 1970, the Authority solicited bids for construction of one section of the highway (San Juan-Ponce, PR-52). Garlam, a contractor affiliated with the West India Machinery and Supply

Company, Inc., won the Authority's bid competition. On January 22, 1971, Garlam and the Authority entered into a unit price contract which bound Garlam to perform all the work connected with this section of the highway at specified rates. Based on those rates and the estimated quantities in the contract, the estimated total cost of project was $13,498,412 (Brief for Petitioner at 2).[2] The highway was completed and opened for public use on June 8, 1975.

Section 4.3 of the General Conditions to the contract provided a degree of flexibility for both parties. The Authority retained the right to issue additional work orders, change orders, and force accounts and thereby to alter the quantity of work and materials necessary to fully complete the project.[3] The contractor had the right under section 4.3(d) to renegotiate the unit prices for additional work if the net effect of all changes and additional work orders was to increase or decrease the total cost of the contract by more than 25 percent:

> [I]f demand is made by either party, overruns or underruns on any or all items resulting in a sum total change of more than 25% of the total cost of the contract, calculated from the original proposed quantities and the original contract unit price, shall require

---

[1] The parties below were Garlam Enterprises Corporation, plaintiff, and Autoridad de Carreteras de Puerto Rico, defendant.

[2] When bidding for a unit price contract, the contractor does not bid a flat fee, but rather unit prices for individual sections of the project. The contract itself delineates both the unit prices for each section and estimates of the amount of work to be performed ("original proposal quantities"). Multiplying the unit prices by their respective quantities provides an estimated total contract price.

[3] "4.3—INCREASED OR DECREASED QUANTITIES OF WORK—The Authority reserves the right to make any alterations in plans and changes in the quantity of work and in the quantity of materials to be furnished as may be necessary or desirable to fully complete the proposed construction in a satisfactory manner and the Contractor shall perform the work in accordance with the changed plans. It is recognized that these changes are normal and expected adjustment and that they do not permit changes or modifications of the contract prices provided the resulting overruns or underruns from the quantities in the proposal do not exceed reasonable percentages . . ." [Petition for Reversal in Part, Appendix p. 72 (hereinafter "Appendix")].

> a supplementary agreement signed by the Director [of the Authority] and the Contractor setting forth the necessity of the change and the adjustment of unit prices agreed upon as satisfactory to both parties.

(*Id.* at 73). This language deals with the situation, presented in the instant case, in which many change orders have the aggregate effect of creating a total change of over 25 percent in the original contract price. The language is drawn almost verbatim from standard specifications used in federal highway contracts. *See Morrison-Knudsen Co. v. United States,* 397 F.2d 826, 836-38 (Ct. Cl. 1968).

During the construction period, the Authority issued Garlam nine change orders, twenty-nine orders for additional work, and seven force account projects (Brief for Petitioner at 2). The net effect of these change orders was to increase the actual project cost from $13,498,412 to $26,496,161, almost doubling the total cost, and thereby creating circumstances requiring renegotiation of the contract under Section 4.3(d) (*Id.* at 30).[4]

When presented with the various orders for extra work, Garlam sought to be paid for the added work at increased unit prices, but the Authority refused to do so. For example, Engineer Becerril, the Authority's representative, initially agreed to increased unit prices for force account work, and Garlam performed the additional work (*Id.* at 16).[5] When payment eventually became due, however, the Authority refused to honor these agreements (*Id.*). In some instances, the Authority refused to pay altogether; in other instances it made arbitrary deductions from the amounts due, and only delivered partial payment.[6] Thus, not only did the Authority not pay the higher unit prices requested by Garlam, but in some instances it

---

[4] The amounts stated in the text include a 15 percent increment for profit.

[5] The Authority granted Engineer Justo Becerril full capacity to interpret and administer the contract (*Id.* at 15).

[6] Industry practice provides a profit margin for the contractor at 15 percent above the actual cost. Thus, since the original contract price of $13,498,412.39 included the 15 percent margin, the actual cost to Garlam was $11,729,923.81. The total project cost, however, was $23,040,140.30. With the 15 percent margin, the total contract price should therefore be $26,496,161.34. The Authority paid Garlam a total of $19,503,280.63, owing Garlam a final total of $6,992,880.71 (*Id.* at 30).

also refused to pay for work performed. In total, the Authority refused to pay Garlam anything beyond $19,503,280.63 even though Garlam had expended over $23 million in performance and was entitled to $26,496,161.34 to cover those expenditures and the reasonable profit margin customary to the industry (*Id.* at 2).

Garlam filed suit in the Superior Court of Puerto Rico seeking, *inter alia,* renegotiation of the unit prices for additional work, payment for work performed, consequential damages flowing from the Authority's breaches of contract, and pre-judgment interest under Article 1061 of the Civil Code of Puerto Rico (31 L.P.R.A. § 3025). The Superior Court held that Garlam was not entitled to have the unit prices of the contract renegotiated on the theory that, by performing the work called for in the change orders and additional work orders, Garlam had waived its right to seek higher unit prices under Section 4.3(d) (pp. 14a-15a, *infra*). The court awarded Garlam a total of $2,466,316.73 for work performed and materials supplied, but dismissed the claims for consequential damages as too speculative (p. 11a, *infra*). The court simply ignored Garlam's claim for prejudgment interest, thus effectively denying it without a word of explanation.[7]

On review, the Supreme Court of Puerto Rico affirmed the lower court, denying unit price renegotiation and upholding the money judgment. The Supreme Court failed to mention or discuss the claim for interest under Article 1061 of the Civil Code. Garlam, in an effort to have at least one court acknowledge and decide this interest question, filed a petition for rehearing on the issue. The Supreme Court solicited briefs from both parties but, on May 17, 1984, issued a one-sentence order denying rehearing without any explanation.

---

[7] After the judgment, Garlam entered a stipulation on September 1, 1982, which stated that the delivery of the sum owed to Garlam under the judgment would in no way affect or prejudice either party upon appeal to the Supreme Court of Puerto Rico. Garlam subsequently accepted the funds to which it was entitled from the Authority. Despite the stipulation to the contrary, the Authority has asserted that, by withdrawing the money, Garlam waived the right to contest the judgment.

REASONS FOR GRANTING THE WRIT

A writ of certiorari to review the decision of the Supreme Court of Puerto Rico should be granted for two reasons. First, the failure of the Superior and Supreme Courts to give any explanation for refusing to award the prejudgment interest to which Garlam is entitled under Article 1061 of the Civil Code of Puerto Rico (31 L.P.R.A. § 3025) denied Garlam due process and equal protection of the laws. Second, the decision below to deny renegotiation of the contract is based on a fundamental misreading of a contract clause that is drawn from standard specifications of federal highway construction contracts.

I. The Failure to Explain the Refusal to Award Prejudgment Interest Violates the Due Process and Equal Protection Clauses

Garlam was entitled to recover prejudgment interest on the sum of $2,466,316.73, which was awarded by the courts below as compensation for work Garlam performed but for which the Authority refused to pay at the time of final liquidation of the project in June 1975. This claim was approximately one million dollars in interest, sought as a measure of compensation for the damages done to Garlam by the Authority's nearly seven-year delay in paying Garlam for work performed. The claim for prejudgment interest was, thus, a major element in Garlam's case.

Article 1061 of the Civil Code of Puerto Rico requires payment of prejudgment interest where the debtor defaults on an obligation to pay money:

> Should the obligation consist in the payment of a sum of money, and the debtor should be in default, the indemnity for losses and damages, should there not be a stipulation to the contrary, shall consist in the payment of the interest agreed upon, and should there be no agreement, in that of the legal interest.

31 L.P.R.A. § 3025. This language is interpreted to require the award of prejudgment interest where it is established that (1)

the debtor has failed to pay the required sum when due and (2) a demand for such payment has been made. *Midrose Foods, Inc.* v. *Roman,* 454 F.2d 1159, 1160-61 (1st Cir. 1972); *Sobrinos De Bortille* v. *Quinones,* 5 P.R.R. 455, 469 (1904); *see Martinez Fernandez & Cia* v. *Garcia,* 68 P.R.R. 363 (1948); *W. B. Flesh & Bros.* v. *Gonzalez,* 28 P.R.R. 639 (1920). Such interest runs from the date on which extra-judicial demand for payment was made or, if no extra-judicial demand was made, the date the complaint was filed. 28 P.R.R. at 641; 5 P.R.R. at 469.

In the instant case, the Superior Court and the Supreme Court agreed that the Authority failed to pay Garlam $2,466,316.73 for work performed on construction of the highway (pp. 12a and 4a, *infra*). These sums were due Garlam on completion of the project (June 8, 1975), at the very latest, and were demanded by Garlam in connection with final payment of the contract, which took place on December 3, 1975. Thus, Garlam is entitled to prejudgment interest on the unpaid sums under Article 1061 from December 3, 1975 until those sums were paid pursuant to the judgment below on September 2, 1982. Calculated at 6 percent, the legal rate, such interest amounts to $998,858.25. The Superior and Supreme Courts, however, denied Garlam's claim for prejudgment interest without even acknowledging the existence of such a claim, much less discussing or explaining their reasons for denying it (pp. 2a-15a, *infra*).[8]

This failure of both the Superior Court and the Supreme Court to give any reason for rejecting so significant a claim as Garlam's for prejudgment interest denies to Garlam a

[8] The Supreme Court's opinion contains a brief reference to, and denial of, Garlam's claim for interest under Section 44.3(b) of the Puerto Rico Rules of Civil Procedure. A claim for interest under that rule requires a finding that the opposing party has conducted litigation in an "obstinate" manner and, accordingly, is separate and distinct from a claim for interest on default under Article 1061 of the Civil Code. Garlam's interest claim under the latter is not mentioned in the Supreme Court's opinion.

fundamental element of fair procedure required by the due process clause of the United States Constitution.[9] A litigant is entitled, under that clause, to a statement by the decisionmaker of the reasons for his decision and the evidence he relied on. For example, in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), this Court held that such a statement of reasons is required in a proceeding to terminate welfare benefits:

> Finally, the decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. [Citations omitted]. To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on, *cf. Wichita R. & Light Co.* v. *Public Utility Commission*, 260 U.S. 48, 57-59 (1922), though his statement need not amount to a full opinion or even a formal findings of fact and conclusions of law.

397 U.S. at 271.

This principle that reasons for the decision must be stated is embodied in the Federal Rules of Civil Procedure, *see, e.g.*, Rule 41(b), and has been frequently applied to the decisions of the lower federal courts. For example, in *Defenders of Wildlife v. Endangered Species Scientific Authority*, 659 F.2d 168, 176 (D.C. Cir.), *cert. denied*, 454 U.S. 963 (1981), the court vacated and remanded because, *inter alia*, the district court had failed to make an adequate statement of the reasons for its decision:

> The district court's conclusory statement fails to provide us with an adequate basis upon which we can review its ruling dismissing the major part of the complaint. We do not know what standards the court applied in determining whether the "defendants have acted improperly," whether the dismissal

---

[9] The requirements of the due process and equal protection clauses have been held applicable to the Commonwealth of Puerto Rico. *See* Arias v. Examining Bd. of Refrigeration and Air Conditioning Technicians, 353 F. Supp. 857 (D.P.R. 1972).

> rested upon a failure of factual proof or a lack of any showing that the federal defendants applied the wrong legal standard, or what the court believed the proper standards for the Scientific Authority to use in making its determination of no detriment.

659 F.2d at 176. Similarly, in *Rucker v. Higher Educational Aids Board*, 669 F.2d 1179, 1183 (7th Cir. 1982), the court remanded for a new trial where the district court had failed to explain adequately its decision. *Accord Kelly v. Everglades Drainage District*, 319 U.S. 415, 422 (1942) (certiorari granted and case remanded for adequate findings); *Denofre v. Transportation Insurance Rating Bureau*, 532 F.2d 43, 44-45 (7th Cir. 1976).

The same rule is routinely applied to the decisions of administrative agencies. In *Gulf States Utilities Co. v. Federal Power Commission*, 411 U.S. 747, 763-64 (1973), this Court approved the remand of a case to the Federal Power Commission because, among other reasons, the Commission had summarily disposed of one party's contentions without stating its reasons for doing so:

> The decision the Commission thus far has made provides us with an inadequate explanation of its reasons for disposing of the Cities' objections on their merits, if that in fact is what occurred. We are provided with no explanation of why summary action was warranted, and we are provided with no reasons for the Commission's possible conclusion that the objectives were meritless.

411 U.S. at 763. *Accord Village of Winnetka, Illinois v. Federal Energy Regulatory Commission*, 678 F.2d 354, 357 (D.C. Cir. 1982) ("an agency must set forth clearly its grounds for decision").

As the foregoing authorities make clear, it is a fundamental principle of fair procedure and due process that the decision-maker explain the basis and reasons for its decision. In the instant case, the courts of Puerto Rico denied Garlam's right to

such an explanation by failing to give any reasons or explanatory statement supporting their refusal to award prejudgment interest under Article 1061 of the Civil Code. Accordingly, Garlam's due process rights were denied and the writ should be granted.

This unexplained and apparently arbitrary failure to grant Garlam prejudgment interest to which it is entitled under Article 1061 also violates Garlam's right to the equal protection of the laws. As demonstrated above, there is no valid dispute that Article 1061 confers upon a litigant in Garlam's position the right to prejudgment interest. Such interest has repeatedly been awarded litigants in the past [10] and, presumably, will be awarded them in the future. Accordingly, the refusal to award such relief to Garlam constitutes an unexplained and arbitrary decision to set Garlam aside from other litigants and deny it a right they are granted. Such an arbitrary singling out of one or a few individuals for denial of a right granted by law violates the equal protection clause. *See, e.g., City of Miami v. Woolin*, 387 F.2d 893 (5th Cir. 1968). The writ should be granted to redress these violations of Garlam's constitutional rights.

II. The Supreme Court Misinterpreted a Standard Federal Contract Clause as Requiring the Contractor, in Order to Avoid Waiving His Right to Seek an Upward Adjustment of the Unit Prices for Additional Work, to Refuse to Perform All Change Orders Until an Agreement on a Satisfactory New Price is Reached

In denying Garlam's claim for renegotiation of the unit prices applicable to increased quantities of work ordered by the Authority, the Supreme Court of Puerto Rico misinterpreted Section 4.3(d) of the general conditions to the construction

---

[10] *See, e.g.*, Fuentes v. Hull Dobbs Co., 88 P.R.R. 544, 553 (1963); Del Rio v. Sastre, 9 P.R.R. 174, 179 (1905); Civico v. Rodriguez, 4 P.R.R. 296, 304 (1903).

contract in such a fashion as to render that section meaningless. As that section was drawn virtually verbatim from standard specifications for federal highway construction contracts, this misinterpretation threatens to nullify that section as included in federally funded highway projects in Puerto Rico.

Section 4.3 of the general conditions governs the Authority's limited right to make changes in the contract requirements and to order additional work. Section 4.3(d) grants to the contractor (Garlam) the right to renegotiate the unit prices applicable to work done under change orders or orders for additional work if the aggregate effect of all such orders is to increase or decrease the total cost of the contract by more than 25 percent compared to the original contract cost:

> It is mutually agreed that, if demand is made by either party, overruns or underruns in any or all items resulting in a sum total change of more than 25% of the total cost of the contract, calculated from the original proposal quantities and the original contract unit prices, shall require a supplemental agreement signed by the Director and the Contractor, setting forth a necessity for the change and the adjustment of unit prices agreed upon as satisfactory to both parties.

This language is drawn virtually verbatim from federal specifications for highway projects. *See Morrison-Knudsen Co.* v. *United States*, 397 F.2d 826, 836-38.

In the instant case, change orders and additional work orders issued by the Authority increased the cost of the contract from approximately $13 million to approximately $26 million, an increase of 100 percent. Nevertheless, the Supreme Court of Puerto Rico held that, because Garlam had performed the added work in response to change orders and additional work orders, it waived its right to seek adjustment to the unit prices, even though the change orders increased the total cost of the contract by far more than the 25 percent required to trigger that right to renegotiate (pp. 2a-3a, *infra*). The Supreme Court so held despite evidence showing that Garlam requested increases in the unit prices and the Authority, in some instances, initially

agreed to such increases. Thus, the Supreme Court of Puerto Rico apparently interprets Section 4.3(d) as barring renegotiation unless the contractor refuses to proceed with a particular change order until a final agreement on a renegotiated unit price is achieved.

This interpretation renders Section 4.3(d) meaningless and places the contractor in an untenable position. The section is drafted to cover the situation in which many small change orders and extra orders have the aggregate effect of increasing the contract cost by more than 25 percent. When the first of such change orders is issued, the contractor will have no way of knowing whether subsequent change orders will be issued and, if so, whether their aggregate effect will be to increase costs beyond 25 percent. Accordingly, the contractor, at the time of receiving the first order, cannot know whether he has a valid right of renegotiation as to that order and must comply with it unless he wishes to risk violating his contractual obligations. The same situation will pertain as subsequent change orders are issued until the 25 percent ceiling is reached. Only then will the contractor have the factual basis required to assert his renegotiation right under Section 4.3(d). By that time, however, if the interpretation of the Supreme Court of Puerto Rico is allowed to stand, the contractor, at least in Puerto Rico, will have long since waived his right to renegotiate as to all the earlier change orders with which he complied. Such an interpretation destroys the meaning and purpose of the section.

The section is properly interpreted to give the contractor a right to renegotiation, or to an equitable adjustment if the Authority refuses to negotiate when the effect of all change orders with which he has complied is to increase project costs by more than 25 percent. Such an interpretation is in accord with Court of Claims interpretations of this and similar clauses, which provide a right to an equitable adjustment in unit prices

where the 25 percent ceiling is exceeded or, in the absence of such a specification in the contract, where the changes alter the scope of the project described in the contract. *See, e.g., Morrison-Knudsen Co.* v. *United States,* 397 F.2d at 841-43 (adjustment granted even though contractor had performed under change orders and the 25 percent ceiling had not been exceeded); *Sadler* v. *United States,* 287 F.2d 411, 413-15 (Ct. Cl. 1961) (contractor that had performed excavation work under change order permitted recovery in excess of unit prices because change was outside scope of contract).

The writ should be granted to correct the Supreme Court of Puerto Rico's erroneous interpretation of this standard contract clause and thereby to prevent that erroneous interpretation from governing the clause as it is incorporated into contracts for federally funded highway projects in the Commonwealth of Puerto Rico.

CONCLUSION

For the foregoing reasons, petitioner Garlam Enterprises Corporation respectfully requests that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of Puerto Rico.

Respectfully submitted,

LUIS GUINOT, JR.
PAUL A. LENZINI*
WILLIAM A. HUTCHINS
1825 Eye Street, N.W.
Suite 300
Washington, D.C. 20006
(202) 293-8600

Of Counsel:

CHAPMAN, DUFF AND PAUL
1825 Eye Street, N.W.
Suite 300
Washington, D.C. 20006
(202) 293-8600

Dated: August 15, 1984

**Counsel of Record*

APPENDIX

TABLE OF CONTENTS

	Page
Judgment of the Supreme Court of Puerto Rico dated February 29, 1984	2a
Recital of the Case, Findings of Fact, Conclusions of Law and Judgment of the Superior Court of Puerto Rico, San Juan Part, dated June 15, 1982	6a
Resolution of the Supreme Court of Puerto Rico dated April 18, 1984	16a
Resolution of the Supreme Court of Puerto Rico dated May 17, 1984	17a
31 L.P.R.A. § 3025	18a

IN THE

Supreme Court of Puerto Rico

No. R-82-401

GARLAM ENTERPRISES CORPORATION,
Plaintiff-Petitioner,

VS.

AUTORIDAD DE CARRETERAS DE PUERTO RICO,
Defendant-Respondent.

REVIEW

JUDGMENT

In San Juan, Puerto Rico, February 29, 1984.

After due consideration to petitioner's statements we are convinced that judgment should be affirmed.

First of all, petitioner had argued that the Court below erred when it concluded in its judgment that petitioner had waived the right granted to it by clause r.3(d)* of its contract with the Roads Authority of Puerto Rico to re-negotiate the same if the cost of the changes ordered at the site exceeded 25% of the total cost of the original contract. The Court determined that the procedure provided by the mentioned clause was effectively replaced by following agreements between the parties, motivated by the different change orders and additional work. According to the Court, for all purposes, they constituted contracts, which if they included conditions identical to the original contract, was only because both parties agreed to it.

Petitioner has impeached said conclusion, insistently alleging that under the terms of the contract the re-negotiation of the same was mandatory. However, the determination of the Court below is supported by the provisions of clause 4.3(e) of the

contract. This clause clarifies that Garlam had no contractual obligation to perform additional work under the same conditions as the rest of the job if the cumulative cost of these additions would exceed the pre-agreed limit of 25%. Having consented, without being bound to do so, to execute the change orders at determined prices, it is not illogical to conclude that Garlam effectively waived it right to re-negotiate the contract under clause 4.3(d). It can not now, after finishing the job, pretend an unilateral change of conditions, which had it been timely raised, might have motivated the Authority to seek alternative mechanisms. No error was committed.

Neither did the Court below erred when it decreed that the compensation for the excavation of benchings required at the job should be performed at $2.03 per cubic meter, pursuant to the price agreed for the unclassified excavations, instead of $2.95 per cubic meter as borrow material. Spite the fact that Garlam claims that the material so excavated was used as borrow material in other parts of the job, the Court below concluded otherwise. We do not find any reason to alter such conclusion. As a matter of fact, the explanation given by Engineer Miguel P. Velez on the benching digging technic supports the same. See Engineer Valez's Deposition on pages 120-128.

Nor has petitioner the reason as to the other items claimed. We do not find its allegations as to the fact that the Authority was hindered, under the terms of the contract, to perform any additional rolling tests after the job was delivered, with more precise methods than those described in the contract, to be convincing. We do not believe either that the Court below abused its discretion when it denied Garlam's claims as to damages allegedly suffered by the non-compliance of the contract by the Authority and as to the allegedly undue discount made by the Authority because the work was delivered 37 days late. The first are evidently speculative. In relation to the latter, even though petitioner allege to have a credit of 1.959.47 days pursuant to the bonifications provided by clause 8.6 A of the contract, the truth of the matter is that it has not placed us in a position to pass judgment on its claims. Further-

more, they require findings of fact as to the existence or non-existence, for each claimed day, of some event that would merit a bonification under the mentioned clause. This is inherently a function of the courts below which we can not assume in the absence of the elements that would allow us to conclude that there has been an abuse of discretion by the trial judge.

Finally, the sentencing court did not err when it refused to impose interests from the date of filing of the complaint and lawyers' fees. The determination that one party has acted with temerity belongs to the sentencing court. In the case at bar, it has not been shown to us that it has abused the same. *Montañez Cruz* v. *Metropolitan Construction Corp.* 37 D.P.R. 38, 40 (1962); *San Miguel Fertilizer Corp.* v. *Puerto Rico Drydock & Marine Terminals*, 94 D.P.R. 424, 442 (1967).

For the reasons stated above, the appealed judgment is hereby affirmed. The Associate Judge Mr. Negrón Garcia did not intervene.

(sgd.)LADY ALFONSO DE CUMPIANO/Clerk

FOOTNOTE

* The text of the clause provides, in its pertinent parts:

4.3 INCREASED OR DECREASED QUANTITIES OF WORK. The Authority reserves the right to make any alterations in plans and changes in the quantity of work and in the quantity of materials to be furnished as may be necessary or desirable to fully complete the proposed construction in a satisfactory manner and the Contractor shall perform the work in accordance with the changed plans. It is recognized that these changes are normal and expected adjustment and that they do no permit changes or modifications of the contract prices provided the resulting overruns or underruns from the

quantities in the proposal do not exceed reasonable percentages. These percentages and the method to be followed are fixed as a part of the contract as follows:

a) . . .

d) It is mutually agreed that, if demand is made by either party, overruns or underruns in any or all items resulting in a sum total change or more than 25% of the total cost of the contract, calculated form the original proposal quantities and the original contract unit prices, shall require supplemental agreement signed by the Director and the Contractor setting forth the necessity for the change and the adjustment of unit prices agreed upon as satisfactory to both parties.

e) *The contract does not obligate the Contractor to perform at original contract unit prices, overruns or underruns generating a total in dollars or in extent of more than 25% of the original contract* (Emphasis supplied)

In the event a satisfactory adjustment in price cannot be reached for any item or items, the Authority reserves the right to eliminate the increased quantity from the contract and may require the Contractor to perform the work force account or may do the work in any other manner as may be deemed best for the Authority.

[SEAL]

IN THE

Superior Court of Puerto Rico

SAN JUAN PART

Civ. No. 76-1432 (902)

GARLAM ENTERPRISES CORPORATION,
Plaintiff,

VS.

AUTORIDAD DE CARRETERAS,
Defendant.

RE: CIVIL ACTION

RECITAL OF THE CASE, FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

RECITAL OF THE CASE

The complaint contains several claims from Garlam Enterprises Corporation against the Roads Authority (Authoridad de Carreteras) arising from the execution of the contract for the construction of a stretch of Las Americas Expressway going from San Juan to Ponce. At trial, voluminous documentary as well as oral evidence was presented. By the evaluation we have made of the same, we formulate the facts, the applicable law and grant due relief.

FINDINGS OF FACT

1) Garlam Enterprises Corporation (Garlam), a corporation organized under the laws of the Commonwealth of Puerto Rico and the Roads Authority, a public corporation created by Act 74 of June 23, 1965, subscribed a contract on January 22, 1971, in which Garlam was bound to perform for

the Roads Authority all the necessary labor for the stretch of Las Americas Expressway going from San Juan to Ponce, called R-12, the Palma Cerro de los Cielos consisting of 5 860 kilometers, within Stations 193 + 50 to 252 + 10.045. Said contract provided for the construction of 41 activities of different nature, calculated on the basis of estimated amounts and unit prices for a total of $13,489,412.39, adjudicated the same to Garlam at the public auction for said job held on December 2, 1970. Said contract established that the mentioned construction would take 600 working days starting from February 1, 1971. (Allegations of the Complaint admitted at answers nos. 1, 2, 3, 5, 6, and 9 in part and Plaintiff Exhibit 1—construction contract)

The amount of the job which exceeded the original price of the construction contract was the product of the negotiations between Roads Authority and Garlam in which it was mutually agreed to some additional works and modifications to the auctioned job, its prices and other conditions for its performance. These agreements were channeled through several change orders and extra work orders. (1)

2) During the construction the Roads Authority issued 30 extra work orders and 9 change orders. It certified works performed by Garlam in the amount of $21,102,283.00. In the final liquidation, it made discounts at several items for a total of $1,598,943.80, paying Garlam the difference of $19,503,334.20. Garlam rejected said deductions and its claim in the case at bar comprises the amount to which said refusal refers to.

3) The Roads Authority designed the project as a balanced one, that is, one in which all the material to be used in the same would be obtained from within the construction design lines, with the exception of 166,000 cubic meters needed to balance the cuts and refills that would be moved from an adjacent project. Errors in the calculations of photogrammetry (2) and in the calculation of the swelling or shrinking of the material at the designing stage of the project, caused Garlam to deposit a substantially greater volume of borrow material—1,095,050.60 cubic meters. From this amount the Roads Authority deducted Garlam at the final liquidation 376,753.11 cubic meters, previously certified and paid at the rate of the unit price agreed for

said borrow material, which was $2.95 per cubic meter and 9,050.60 cubic meters deposited which had not been paid before, for a total of 385,803.71 cubic meters unpaid of borrow material. This total computed at a rate of $2.95 per cubic meter gives the amount of $1,138,120.94, which amount Garlam has claimed from Roads Authority and the latter has refused to pay.

4) Of the 4,364,531.04 cubic meters of material cuts, the total verified at the project by Garlam was 4,076,108.06 cubic meters were done within the design lines of the project or at the prism of the road, resulting in an overcut of 288,422.98 cubic meters not foreseen at the plans by the designer. On the other hand, it made miscellaneous cuts under the subgrade line. 30,052 cubic meters and 1,533.22 cubic meters which it deposited on embankments which were used in the correction of rainwater ditches. Since it was necessary to remove this material and transfer the same to the embankments, which carried the use of cargo equipment by Garlam, the Roads Authority agreed with it to pay the same at a rate of $2.95 per cubic meter. This agreement was verified through Engineer Justo A. Becerril, Executive Director of the project in representation of the Roads Authority. This party did not honored the same and opted to paid the material at a rate of $2.03 per cubic meter, that is, the price agreed upon in the contract for the unclassified excavations. Therefore, it has not paid 320,008.20 cubic meters of that material (the addition of 288,422.98, 30,052 and 1,533.22 cubic meters already mentioned) at a rate of $.92, which gives a total of $294,407.54.

5) of the 10,865 645 tons of asphalt served by Garlam to the Roads Authority at the project, the latter certified and paid at the agreed price of $26.88 (3) a remnant of 553.645 tons. For this item there is an impeached balance of $46,305.57.

6) The total excavations for different concepts at the project came up to a total of 6,042.027 cubic meters (4). On the other hand, the total of the material compacted by Garlam at the project came up to a total of 5,054,338.92 cubic meters, which the Roads Authority paid at the agreed upon rate of 30 cents per cubic meter. That is, the volume of compacted

material for which the Roads Authority paid was less than the material excavated and deposited on the lands, from which it can be inferred that when the Roads Authority made said payment it did not consider at all the swelling that is produced when a material is excavated which is to be deposited and compacted somewhere else. We determine that in the absence of other factor in the evidence shown, the consideration of 20% as swelling factor claimed by Garlam is reasonable due to the circumstances indicated by the material excavated at the project in general. (5)

As per what is stated above, the excavated and finally compacted material at the project comes up to 7,250,434.54 cubic meters due to the effect of said swelling factor (6,042,027.12 cubic meters x 1.20), that is, the total material excavated and compacted with the addition of the swelling factor. Deducting from this amount the compacted material paid by the Roads Authority to Garlam totaling 5,054,338.92 cubic meters, there is a difference of 2,196,093.62 cubic meters which represents the portion of the material due to the swelling factor; this computed at 30 cents per cubic meters gives a balance of $658,828.09. From this balance, the compacting determined by summary judgment issued in this case on March 12, 1978 of $7,274 43 corresponding to 24,248.08 cubic meters, should be deducted, leaving $651,553.66 for the swelling factor of the compacted material, amount which has yet to be paid to Garlam.

7) The construction contract required the construction of benchings in order to avoid the sliding down of the embankments. Their construction by Garlam required and comprised the excavation of 137,794.32 cubic meters of material. Garlam assumed the cost of the compacting of this material as a subsidiary obligation to the construction of said benchings, in accordance with the contract signed—see Specification SP-27(1)-3.1. However, the contract did not provide for the payment of the excavation labor for these benchings. Spite the fact that it was a job really performed by Garlam, the same has not been paid and Garlam has claimed said payment on the complaint at the unit price for the unclassified excavations, that is, at a rate of $2.03 per cubic meter for a total of $279,722.67 (6).

8) Garlam performed several works under force account, pursuant to the construction contract for those cases in which there has not been any possible agreement as to the work to be performed. The Roads Authority agreed to the fact that it would recognize a 25% of industrial benefits and a 15% for management expenses at said works. They were works for which Garlam financed and provided the equipment, labor and materials, during the performance of the job with the agreement with the Roads Authority that the latter would compensate the incurred costs and would recognize the mentioned benefits. The total of $995,897.47 which comprised the cost of the job performed through the force account should have included the totality of the mentioned agreed upon benefits; however, in the final liquidation, this was not the case.

As of the date of the final liquidation of the job performed through force account, the Roads Authority had paid Garlam $647,112.83, finally liquidating $292,579.09 for a total paid of $939,691.12. This payment, therefore, did not include the amount of $56,206.35.

9) Since the paving done exceeded the tolerance limits established in the specifications as per test to that effect, the Roads Authority deducted $35,000.00 from the final liquidation to Garlam.

10) In clause 8.7 of the contract the parties agreed to the setting of a penalty of $2,300 per day as liquid damages in favor of the owner of the job in the event of delay in the delivery of the same. By Agreement signed on April 9, 1974, the Roads Authority and Garlam agreed to the performance of several works in addition to those covered by the construction contract, for which they extended up to October 31, 1974 the delivery date of the job. This term was afterwards extended to May 2, 1975, by agreement between the parties. When the job was delivered on June 8, 1975, there was a delay of 37 days, period which computed based on the fixed daily penalty set as liquid damages signifies $85,100.00. This amount was deducted by the Roads Authority in the final liquidation to Garlam.

11) Garlam has claimed damages for having been barred from obtaining bonds for other construction projects and for having suffered a decrease in its credit lines. We do not make precise determinations of facts as to these allegations since the vagueness and the speculative nature of the evidence shown as to this, do not allow the court to do so. In this sense, the third and fifth cause of action have not been supported by the evidence.

The fourth cause of action of the complaint claims expenses allegedly incurred by Garlam when it was force to keep a managing organization to file the claims of the complaint. Garlam reiterated this allegation when it stated its theory at the Status Conference Report, used later on as pre-trial report and in its brief filed after the presentation of evidence at trial. However, in replying to the opposition of the Roads Authority in its brief, it withdrew this point of the claim since it judged it to be not relevant thereof, limiting itself to state that it shall claim it as costs on its day. We shall not provide for this point any further than to considered it dismissed.

CONCLUSIONS OF LAW

The obligations arise from the law, from the contracts and quasicontracts and from the illegal acts and omissions in which any kind of guilt or negligence intervenes. Art. 1042 of the Civil Code. Those which arise from the contracts have the power of law between the contracting parties and must be complied with in accordance thereof. Art. 1044, Civil Code.

The complaint at bar and the evidence that support the allegations contain claims arisen from the contractual agreements arrived at by the parties for the performance and conclusion of the job originally contracted on January 22, 1971. Under these agreements the Roads Authority did not honor the payment of works really performed by Garlam, for which it should answer. The amounts and concepts thereof are consigned in the findings of facts numbers 3 to 8.

Due to the result of the evidence shown, we conclude that the other claims, to which findings of facts number 1, (7) 9, 10 and 11 refer, are not relevant. By the effect of this last determination, the claims contained in the third, fourth and fifth causes of action are hereby dismissed.

JUDGMENT

The complaint is hereby granted in accordance to the findings of fact and the conclusions of law already stated and the Roads Authority is hereby sentenced to pay Garlam Enterprises Corporation, the following amounts:

a)	Deposit of 385,803.71 cubic meters of borrow material agreed upon at $2.95 per cubic meter (Finding of Fact No. 3)	$1,138,120.94
b)	Difference owed in overruns and miscellaneous cuts—320,008.20 cubic meters at 92 cents. (Finding of Fact No. 4)	294,407.54
c)	Asphalt served—553.645 tons at $25.88—(Finding of Fact No. 5)	46,305.57
d)	Compacted material—2,196,093.62 cubic meters at 30 cents, less $7,274.43 granted by summary judgment of March 12, 1978 (Finding of Fact No. 6)	651,553.66
e)	Excavation of material for benching 137,794.32 cubic meters at $2.03 (Finding of Fact No. 7)	279,722.67
f)	Industrial benefit and management expenses in works performed through force account (Finding of Fact No. 8)	58,206.35
	TOTAL TO BE PAID...	$2,466,316.73

The Roads Authority shall also pay Garlam Enterprises Corporation the legal interest on said total, starting from the date of this judgment and up to the time the amount is paid—Rule 44.3(a) of the Civil Procedure—and the costs of this proceedings.

TO BE REGISTERED AND NOTIFIED.

Issued in San Juan, Puerto Rico, June 15, 1982.

(sgd.) ABNER LIMARDO/Superior Court Judge

FOOTNOTES

1) Through Clause 4.3 of the General Conditions of the Contract, the Roads Authority reserved the right to make alterations to the plans and changes in the amount of the job and the material to be supplied, as it considered necessary to complete the job. We literally transcribe the pertinent portions of said clause:

> "INCREASED OR DECREASED QUANTITIES OF WORK—The Authority reserves the right to make any alterations in plans and changes in the quantity of work and in the quantity of materials to be furnished as may be necessary or desirable to fully complete the proposed construction in a satisfactory manner and the Contractor shall perform the work in accordance with the changed plans. It is recognized that these changes are normal and expected adjustment and that they do not permit changes or modifications of the contract prices provided that the resulting overruns or underruns from the quantities in the proposal do not exceed reasonble percentages. These percentages and the method to be followed are fixed as a part of the contract as follows:
>
> 4.3(d)—It is mutually agreed, that, if demand is made by either party, overruns or underruns in any or all items resulting in a sum total change of more than 25% of the total cost of the contract, calculated from the original proposal quantities and the original contract unit price, shall require a supplemental agreement signed by the Director and the Contractor setting forth the necessity for the change and the adjustment of unit price agreed upon as satisfactory to both parties".

2) Photogrammetry is the process used in the obtention of plans for large extensions of lands through aerial photographs. Due to the density of the vegetation at some areas, the line of the land was projected at a higher position than where it really was, which caused the lack thereof.

3) The construction contract did not provide for the deposit of the asphalt at the project, but the same was served through additional work orders as to that.

4) This total is distributed as follows:

Overcuts	288,422.98	cubic meters
Cuts under the sub-grade line .	30,052.02	" "
Correction cuts for rain-water ditches.....	1,533.22	" "
Unclassified excavations for structures	36,635.31	" "
Borrow material	1,095,050.06	" "
Benching Excavations.....	137,794.32	" "
Unclassified Excavations determined in summary judgment of March 8/78	4,411,403.48	" "
Excavation for borrow material for foundations and embankments.....	41,135.21	" "

5) This factor turns out to be the half of the addition of swelling factors estimated by the designer of the project for the cases of soft and hard rock of 15% and 25% respectively.

6) We discard it and the later Garlam's argument has not basis in the evidence for the afterwards payment of said material at a rate of $2.95 as borrow material.

7) The parties having agreed as to the additional works and the changes had through mutual agreement of the work to be done and the price to be paid through change and additional work orders, they substituted the mechanism of supplementary agreement to which clause 4.3(d) of the General Conditions of the Contract refers to. In these circumstances, the provisions of the mentioned clause turned ineffective for the re-negotiation of the prices originally contracted. The fact that in different items,

as shown by the evidence, the parties agreed to prices equal to those agreed upon in the construction contract originally signed, does not render the agreement on the same inefficient nor are they still tied to the original contract through clause 4.3(d) up to the point of making the re-negotiation claimed imperative. The parties in the issuance and execution of change and additional work orders consented to the fundamental extremes related to the job to be performed and to the prices to be paid for it, and the imposition of conditions not contemplated in such agreements via the re-negotiation is not mandatory.

[SEAL]

[SEAL]

IN THE

Supreme Court of Puerto Rico

No. R-82-401

GARLAM ENTERPRISES CORPORATION,
Plaintiff-Petitioner,

vs.

AUTORIDAD DE CARRETERAS DE PUERTO RICO,
Defendant-Respondent.

RESOLUTION

San Juan, Puerto Rico, April 18, 1984.

After seeing the motion for reconsideration under the provisions of Rule 45(d) of the Regulations of this Court, and having seen the provisions of arts. 1053 and 1061 of the Civil Code, 31 L.P.R.A, secs. 3017 and 3025, respondent is hereby granted a term that shall become due on April 30 of this year to state the reasons it has for which the modification of the appealed sentence should not be modified so as to grant the payment of legal interests as of December 3, 1975, date in which the incomplete final payment was made.

So decided the Court and it is hereby certified by the Clerk. Presiding Justice Mr. Trias Monge and Associate Justice Mr. Negrón Garcia did not intervene.

(sgd.) LADY ALFONSO DE CUMPIANO/Clerk

[SEAL]

IN THE

Supreme Court of Puerto Rico

No. R-82-401

GARLAM ENTERPRISES CORPORATION,
Plaintiff-Petitioner,

VS.

AUTORIDAD DE CARRETERAS DE PUERTO RICO,
Defendant-Respondent.

REVIEW

RESOLUTION

San Juan, Puerto Rico, May 17, 1984.

After seeing and considering the "Motion in Opposition to Reconsideration and in Compliance with Order" of respondent dated April 30, 1984 and the reply thereto presented by party petitioner, dated May 11, 1984, the motion for reconsideration is hereby denied.

So decided the Court and it is hereby certified by the Clerk. The Presiding Justice Mr. Trias Monge and the Associate Justice Mr. Negrón Garcia did not intervene.

(sgd.) LADY ALFONSO DE CUMPIANO/Clerk

§ 3025. Interest as indemnity for nonpayment of money

Should the obligation consist in the payment of a sum of money, and the debtor should be in default, the indemnity for losses and damages, should there not be a stipulation to the contrary, shall consist in the payment of the interest agreed upon, and should there be no agreement, in that of the legal interest.

Until another rate is fixed by the Government, interest at the rate of six percent per annum shall be considered as legal.—Civil Code, 1930, § 1061.